against—the death of the assured—is brought about by his willful, deliberate act when in sound mind?"

We have not found it necessary to express any opinion as to whether or not the by-law in question in this case would be binding upon members who afterwards became insane, and while insane committed suicide, and as to such persons no opinion is expressed.

We think the authorities cited fully vindicate the opinion and judgment of the circuit court, and it is affirmed.

**Note.**

The decision in the principal case is supported by the great weight of authority, and besides is dictated by a sound public policy. Similar rulings have been made by the supreme courts of Tennessee and Alabama. See Supreme Lodge K. of P. *v.* Lamalta, 95 Tenn. 156, 38 L. R. A. 838; Sup. Commandary *v.* Ainsworth, 71 Ala. 436. In all of these cases, as in the principal case, the insured agreed to abide by the rules and regulations now in force, or that may hereafter be enacted. The fact that he agreed to comply with all legislation not only then in existence but thereafter enacted, will doubtless reconcile a contrary ruling in Illinois. In that case (Northwestern Benevolent & Mutual Aid Association of Illinois *v.* Warner, 24 Illinois App. 357) was decided that an attempt to make suicide a cause of forfeiture, by enacting a by-law to that effect, did not affect past contracts, and the decision was based on the general rule that no law shall be passed invalidating a contract existing at the time of its passage. It does not appear from the case whether he agreed to abide by laws subsequently enacted as the principal case.

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## SOUTHERN RY. CO. *v.* SIMMONS.

June 14, 1906.

[55 S. E. 459.]

**Pleading—General Demurrer—Duplicate.**—An objection that a count of a declaration charges negligence on the part of defendant in the employment of its servants, and negligence on the part of the servants themselves, constituting two separate and distinct causes of action, cannot be taken by general demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 503.]

**Same—Form in General—Rules of Railroad Company.**—It is not necessary in a declaration where a reference is made to the rules, orders, and requirements of a railroad company that they should be set out in full, but it is sufficient to aver their legal effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 30.]

**Railroads—Operation—Regulation of Interstate Traffic—Automatic Couplers—Statutory Provision.**—Act Cong. March 2, 1893, c. 196,

§ 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], providing that it shall be unlawful for any common carrier to use on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, requires the use of couplers which can be coupled, as well as uncoupled, without men going between the ends of the cars.

**Damages—Grounds of Compensatory Damages—Dependents of Plaintiff—Evidence.**—In an action for personal injuries, evidence that plaintiff has a wife and children is inadmissible on the question of damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 496.]

**Writ of Error—Harmless Error—Admission of Evidence.**—The admission of evidence that plaintiff, in an action for personal injuries, had a wife and child dependent on him was not rendered harmless by the admission of other evidence that he was married, where there was no other evidence of the existence of a child dependent on him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4161.]

**Trial—Correction of Error—Admission of Evidence.**—The error in admitting evidence that plaintiff, in an action for personal injuries, had a wife and child dependent on him was not cured by instructions as to the measure of damages, where the objectionable evidence was not explicitly withdrawn.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial § 977.]

**Master and Servant—Injuries to Servant—Contributory Negligence.**—Where a railroad employee had undertaken the business of coupling and uncoupling cars, it was his duty to exercise such care as reasonably prudent men would exercise under like circumstances, and, where he knew, or, by exercising such care as a reasonably prudent man would exercise under the circumstances could have known, that engines were backing cars on the track where he was about to couple cars, and he went in between the cars, and his failure to exercise reasonable care contributed to his injuries, he was guilty of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 706-709, 755.]

**Trial—Instructions—Conformity to Proof.**—In an action for injuries to a railroad employee, an instruction that if he was guilty of contributory negligence, the jury must find for defendant, unless the conductor had knowledge of his dangerous position immediately before the accident and might, by the exercise of ordinary care, have

prevented the accident, was erroneous, where there was no evidence of such knowledge on the part of the conductor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596, 603.]

**Master and Servant—Injuries to Servant—Contributory Negligence.**—A railroad employee had the right to presume that the railroad company would conduct its business with reasonable regard to its rules prescribing his duties and with reasonable care for his safety while performing his duties in coupling and uncoupling cars.

**Trial—Arguments of Counsel.**—Where there was a discrepancy between plaintiff's testimony as to his age and his statement previously made to defendant railroad company, and the court refused to permit defendant's counsel to comment on the discrepancy without first recalling plaintiff and giving him an opportunity to explain it, but afterwards plaintiff's counsel withdrew all objection to discussion of the question, but defendant's counsel refused to take advantage of this fact, the refusal of the court in the first instance was not ground for reversal.

**Same.**—In an action for injuries to a railroad employee, it was improper for his counsel in argument to express the fear that the railroad employees who had testified for him against the company would lose their places, and to state that counsel for the railroad company rode in private and palace cars when they came to court, that the mind could not grasp the extent of the resources and possessions of the company, while plaintiff was a poor man with nobody but his wife and child, that the treasury of the company was so exhaustless that it would hardly feel the loss of the amount claimed, and that, in estimating damages, the jury should take into consideration the fact that exceptions had been taken by the defendant, and that it had been stated that if the verdict went against defendant, it would appeal.

Error to Circuit Court, Brunswick County.

Action by S. W. Simmons, Jr., against the Southern Railway Company. From a judgment in favor of plaintiff, defendant brings error. Reversed.

*A. P. Thom, W. L. Williams, E. R. Turnbull, Jr.*, and *R. T. Thorp*, for plaintiff in error.

*C. J. Faulkner* and *Buford, Palmer & Eggleston,* for defendant in error.

KEITH, P. There was a judgment against the Southern Railway Company at the suit of Simmons for injuries which he had sustained while acting as a brakeman in the service of the railway company, and engaged in coupling cars at Lawrenceville. To that judgment the railway company obtained a writ of error.

The railway company demurred to the declaration and to

each count, and its first assignment of error is to the judgment of the circuit court in overruling its demurrer.

The objection made to the first count is that it not only charges negligence on the part of the company in the employment of its servants, but negligence on the part of the servants themselves; that the negligence of the company and that of its servants constitute two separate and distinct causes of action, and should not have been combined in one count.

In Norfolk & Western R. Co. *v.* Ampey, 93 Va. 121, 25 S. E. 227, this court said: The foundation of the objection to the declaration is that the first count "alleges three distinct grounds of negligence as the cause of the injury sustained by the plaintiff, either of which would of itself, independently of the others, constitute a sufficient ground for the action. In other words, the claim is that the count is bad for duplicity. The grounds so stated are: The negligence of the defendant in failing to exercise due care in selecting competent servants, in failing to provide a sufficient number of train hands, and in failing to supply and maintain suitable and safe machinery and instrumentalities for the conduct of the business of the defendant. They are conjunctively alleged as concurrent causes which, cooperating together, produced the injury. It is very questionable whether this constitutes duplicity. It is stated by eminent textwriters on the subject of pleading that no matters, however multifarious, will operate to make a pleading double, that together constitute but one connected proposition, or entire point. But even if this count were obnoxious to the charge of duplicity, the fault could not be taken advantage of on a general demurrer. The objection for duplicity relates to matter of form only, and does not go to the substance of the pleading. Being an objection to the form and not to the substance of the declaration, it could only be availed of, even at common law with all of its rigid rules of pleading, by special demurrer."

This assignment of error is not well taken.

The demurrer to the second count rests upon the omission of the count to state specifically the rules, orders, and requirements of the railroad company which are therein referred to, and because "the act of Congress referred to does not require the defendant, in the operation of cars engaged in interstate commerce, to employ cars provided with such couplers as will couple automatically without any necessity for brakemen ever going in between the cars. The only thing that the act required was that the couplings should be of such a nature that after they had been fixed and were ready to be coupled that there should be no necessity for being in between the cars at the time when they came together. The allegation of the count imposes upon the

company a duty which the law does not impose, and is, therefore, bad on demurrer."

We do not think that it is necessary, in a declaration where reference is made to the rules, orders, and requirements of a railroad company, that they should be set out in totidem verbis, it being sufficient to aver the legal effect of such rules, orders and requirements.

As to the second objection to the count, it seems to be disposed of by the opinion of Chief Justice Fuller in Johnson *v.* Southern Pacific Company, reported in 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363. That decision construes the second section of the act of Congress of March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes." The second section is as follows:

"That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

It will be observed that the declaration in this case gives the very language of the act of Congress, and avers that it "was the duty of the said defendant, as such common carrier, not to haul or permit to be hauled or used on its said line of railroad any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The railroad company made the same point in the Johnson Case that is insisted upon here by the plaintiff in error, and its view prevailed in the Circuit Court, the judgment of which in favor of the railroad company was affirmed in the Circuit Court of Appeals; but the Supreme Court of the United States, dealing with the subject, said: "We are unable to accept these conclusions" (speaking of the results in the lower courts), "as they appear to us to be inconsistent with the plain intention of Congress, to defeat the object of the legislation, and to be arrived at by an inadmissible narrowness of construction. The intention of Congress, declared in the preamble and in sections 1 and 2 of the act, was 'to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic coup-

lers and continuous brakes and their locomotives with driving-wheel brakes,' those brakes to be accompanied with 'appliances for operating the train-brake system'; and every car to be 'equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars,' whereby the danger and risk consequent on the existing system was averted as far as possible.

"The present case is that of an injured employee, and involves the application of the act in respect of automatic couplers, the preliminary question being whether locomotives are required to be equipped with such couplers. And it is not to be successfully denied that they are so required if the words 'any car' of the second section were intended to embrace, and do embrace locomotives. But it is said that this cannot be so because locomotives were elsewhere, in terms, required to be equipped with power driving-wheel brakes, and that the rule, that the expression of one thing excludes another, applies. That, however, is a question of intention, and as there was special reason for requiring locomotives to be equipped with power driving-wheel brakes, if it were also necessary that locomotives should be equipped with automatic couplers, and the word 'car' would cover locomotives, then the intention to limit the equipment of locomotives to power driving-wheel brakes, because they were separately mentioned, could not be imputed.

"The result is that if the locomotive in question was not equipped with automatic couplers, the company failed to comply with the provisions of the act. It appears, however, that this locomotive was in fact equipped with automatic couplers, as well as the dining car; but that the couplers on each, which were of different types, would not couple with each other automatically by impact, so as to render it unnecessary for men to go between the cars to couple and uncouple.

"Nevertheless, the Circuit Court of Appeals was of opinion that it would be an unwarrantable extension of the terms of the law to hold that where the couplers would couple automatically with couplers of their own kind, the couplers must so couple with couplers of different kinds. But we think that what the act plainly forbade was the use of cars which could not be coupled together automatically by impact, by means of the couplers actually used on the cars to be coupled. The object was to protect the lives and limbs of all railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars; and that object would be defeated, not necessarily by the use of automatic couplers of different kinds, but if those different kinds would not automatically couple with each other. The point was that the railroad companies should be compelled, respectively, to adopt devices, whatever they were,

which would act so far uniformly as to eliminate the danger consequent on men going between the cars.

"If the language used were open to construction, we are constrained to say that the construction put upon the act by the Circuit Court of Appeals was altogether too narrow."

After answering the objection, that the act was to be construed strictly because the common-law rule as to the assumption of risk was changed by the act, and because the act was penal, the opinion continues: "Tested by these principles, we think the view of the Circuit Court of Appeals, which limits the second section to merely providing automatic couplers, does not give due effect to the words 'coupling automatically by impact, and which can be uncoupled without the necessity of men going between the cars,' and cannot be sustained.

"We dismiss, as without merit, the suggestion which has been made, that the words 'without the necessity of men going between the ends of the cars,' which are the test of compliance with section 2, apply only to the act of uncoupling. The phrase literally covers both coupling and uncoupling, and if read, as it should be, with a comma after the word 'uncoupled,' this becomes entirely clear.

"The risk in coupling and uncoupling was the evil sought to be remedied, and that risk was to be obviated by the use of couplers actually coupling automatically. True, no particular design was required, but, whatever the devices used, they were to be effectively interchangeable. Congress was not paltering in a double sense; and its intention is found 'in the language actually used, interpreted according to its fair and obvious meaning.'"

That case disposes of the second count of the declaration.

The next assignment of error arises upon an exception taken by the plaintiff in error to a question propounded to the defendant in error by his counsel.

"Q. Are you a married man? A. Yes, sir.

"Q. Have you any children?"

At this point defendant's counsel interposed, and said: "We do not see what that has to do with it, unless the gentleman is suing for some injury to his wife and children"; upon which counsel for plaintiff replied: "I think it is a perfectly admissible question to show that Mr. Simmons, who is a husband and a father, does not live for himself alone, and when he is incapacitated it seems to me that it is a relevant question upon the quantum of damages for the jury to know not only that he has to provide for himself through life hereafter, maimed as he is, but that he has a wife and child dependent upon him." And thereupon the court overruled the objection of the defendant, and permitted the plaintiff to state the number of his children.

which consisted of one, 12 or 13 years of age; and to this ruling of the court the defendant excepted.

The question seems to be settled by authority.

In Stockton *v.* Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138, it is said that "in an action to recover compensation for injuries done to the person of plaintiff, by the negligence of the driver of a stage, which was thereby upset, the plaintiff cannot give in evidence, for the purpose of increasing the damages, that he had a wife and children."

In Sedgwick on Damages (8th Ed.) § 490, it is stated that damages cannot be augmented by proof that the person injured has a wife and several small children.

Pennsylvania Railroad Co. *v.* Roy, 102 U. S. 451, 26 L. Ed. 141, is a strong authority to the same effect. In that case, Mr. Justice Harlan, speaking for the entire court, said: "There was, however, an error committed upon the trial, to which exception was duly taken, but which does not seem to have been remedied by any portion of the charge appearing in the bill of exceptions. The plaintiff was permitted against the objection of the defendant, to give the number and ages of his children; a son 10 years of age, and three daughters of the ages, respectively, of 14, 17 and 21. This evidence does not appear to have been withdrawn from the consideration of the jury. It certainly had no legitimate bearing upon any issue in the case. The manifest object of its introduction was to inform the jury that the plaintiff had infant children dependent upon him for support, and, consequently, that his injuries involved the comfort of his family. This proof, in connection with the impairment of his ability to earn money, was well calculated to arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted; that is, beyond what was, under all the circumstances, a fair and just compensation to the person suing for the injuries received by him. How far the assessment of damages was controlled by this evidence as to the plaintiff's family, it is impossible to determine with absolute certainty; but the reasonable presumption is that it had some influence upon the verdict.

"The court, in a manner well calculated to attract the attention of the jury, withdrew from their consideration the evidence touching the financial condition of the plaintiff; but as nothing was said by it touching the evidence as to the ages of his children, they had the right to infer that the proof as to those matters was not withdrawn, and should not be ignored in the assessment of damages. For this error alone the judgment is reversed, and the cause remanded for a new trial."

It is claimed on behalf of defendant in error that the case should not be reversed upon this assignment of error, because

there was other evidence admitted without objection to the effect that the plaintiff was a married man; but there is no other evidence in the record of the existence of a child, dependent upon Simmons for support.

Nor do we think that this court is committed to the doctrine by reason of anything that was said in N. & W. Ry. Co. *v.* Ampey, supra, or in Southern Ry. Co. *v.* Oliver, 102 Va. 710, 47 S. E. 862. In the opinions in both cases, the fact that the person injured had others dependent upon him for support is adverted to; but it does not appear that any exception was taken to the admissibility of the testimony, and the propriety of admitting such testimony is not adverted to by the court in either case.

Nor do we think that the error in admitting this evidence is cured by the instruction given to the jury, which states that if the jury find for the plaintiff "they should ascertain his damages not to exceed the sum claimed in the declaration, to wit, $50,000; and in estimating such damages the jury may allow such sum as they may believe from the evidence will be a fair compensation for such bodily and mental suffering as the plaintiff may have been caused by the said injury; and they may also allow such sum as may compensate him for the future loss of his earning capacity so far as the jury may believe from the evidence that he has suffered a loss of his earning capacity as a result of said injury; and they may also allow such sum as will enable him to relieve or nullify the inconvenience occasioned by the said injury if they believe from the evidence that he will in the future experience such inconvenience." The jury are not there told that in estimating his damages they are not to consider the fact that a child is dependent for its support upon the earning capacity of Simmons, and the jury would rightly and properly, upon the evidence before them, have taken that fact into consideration in their estimate of the damages suffered. We are of opinion that while the admission of improper testimony may be corrected by instructions given by the court to the jury, directing them to disregard it, its withdrawal from the jury should be in terms so direct and explicit as to leave no room to apprehend that the jury were not informed with respect to it. Where that is done, it is not to be presumed that the jury were "too ignorant to comprehend or too unmindful of their duty to respect instructions as to matters peculiarly within the province of the court to determine." Penna. R. Co. *v.* Roy, supra.

Numerous instructions were given to the jury, two of which we think were erroneous.

"The court instructs the jury that if they believe from the evidence that the plaintiff had undertaken the business of coup-

ling and uncoupling cars, then it was the duty of the plaintiff, while coupling and uncoupling cars, to exercise such care as a reasonably prudent man would exercise under like circumstances; and if the jury believe from the evidence that the plaintiff, Simmons, knew, or by exercising such care as a reasonably prudent man would exercise under the circumstances, could have known, that engines were backing cars on the track where he was about to couple cars, and that, under the circumstances, he went in between the cars, and that his failure to exercise such care contributed to his injuries, then the said plaintiff was guilty of contributory negligence."

Down to this point we think the instruction correctly propounded the law. But the court made the following addition to it: "And if they so believe, the jury must find for the defendant, unless they further believe from the evidence that Conductor Floyd had knowledge of the dangerous position of the plaintiff immediately before the accident, and might have, by the exercise of ordinary care, prevented the same." And this is the portion of the instruction which we think is open to objection.

Simmons was injured by going in between two cars, which were separated the one from the other by about three feet of space. Just as he got in between the cars, and was arranging the couplers, the engineer, acting under a signal from the conductor, backed the cars upon him, with the result that both of his legs were crushed. Now, if either the conductor or the engineer were guilty of negligence in backing the engine and cars so as to inflict the injury which Simmons sustained, he was entitled to recover; but there was no evidence, and in the nature of things could be no evidence. that the conductor or the engineer had knowledge of the dangerous position of the plaintiff immediately before the accident, and might, by the exercise of ordinary care, have prevented it. The theory of defendant in error's case upon this point was that when he was sent back to couple the cars, the conductor knew, or ought to have known, his position and governed himself accordingly, so as not to back the cars and catch him (Simmons) while engaged, in accordance with the rules of the company and the orders which he had received from the conductor, in preparing the cars to be coupled. This is the view of the case upon which defendant in error insists. Plaintiff in error, however, claims that in going in between the cars the defendant in error was guilty of contributory negligence; and that view of the case is presented in the introductory part of this instruction, and if it existed constituted a defense to the action. It was for the jury to say which of the two theories was sustained by the facts.

Whether the defendant in error was in a position of danger, in obedience to the orders of the conductor and in the discharge

of his duties, or whether he was there, as plaintiff in error insists, as a result of his own contributory negligence, it is certainly true that there is nothing in the situation upon which to rest the doctrine of the last clear chance. If the railroad company, or its agents, were guilty of negligence, defendant in error should recover; if defendant in error was guilty of contributory negligence, that should be an end to his action. Which of the two theories should prevail, was a question for the jury upon the facts; but certain it is that neither the conductor nor the engineer had such knowledge of the position of defendant in error as to render the railway company responsible for their failure to protect him from the consequences of his contributory negligence after his position of danger was known.

The instruction concludes as follows: "But the jury, in determining whether the plaintiff was guilty of contributory negligence, are instructed that the plaintiff had the right to presume that the defendant company would conduct its business with reasonable regard to its rules prescribing his duties, and with reasonable care for his safety while performing his duties;" all of which was entirely proper.

We are of opinion, therefore, that the instruction would have been correct had it omitted the words: "And if they so believe the jury must find for the defendant, unless they further believe from the evidence that Conductor Floyd had knowledge of the dangerous position of the plaintiff immediately before the accident, and might have, by the exercise of ordinary care, prevented the same."

Instruction C is open to the same objection, and if upon another trial the evidence upon this point should be substantially the same as that in the record under consideration, and instructions A and C are again offered, they should be made to conform to the views herein expressed.

The fourth bill of exception arises upon the examination of S. W. Simmons, the plaintiff, as a witness in his own behalf. On his direct examination he testified that he was 39 years of age on the day before he was injured, and during the progress of the case a paper was introduced from which it appears that when he entered the service of the railway company he had made a conflicting statement as to his age. Counsel for the railway company undertook to criticise this apparent discrepancy in his argument before the jury; whereupon the point was made by counsel for the plaintiff that he should not be permitted to do so, as the discrepancy had not been brought to the attention of plaintiff when the paper was introduced in evidence, so as to afford him an opportunity of making an explanation; and this view was taken by the circuit court. Counsel for the railway company was told that he would be permitted to recall the wit-

ness and ask him any question he might desire with reference to the subject, but this he declined to do; and thereupon the court refused to permit counsel to continue his line of argument. It seems that the court at that point adjourned for two days, and when argument was resumed counsel for plaintiff withdrew their objection, and stated that counsel could proceed to make any comments or criticisms he might desire, in his argument before the jury; to which counsel for defendant replied that they did not desire to make any further criticism of the witness, but insisted upon their exception, which was signed and made a part of the record.

We confess our utter inability to discover any trace of merit in this exception, and are at a loss to understand why the record should have been incumbered by it.

Another exception was taken to the line of argument pursued by counsel for defendant in error before the jury. It seems that after the argument had been closed, and the jury had retired to their room to consider of their verdict, counsel for plaintiff in error stated to the court that counsel for defendant in error, in his closing argument, had made certain statements to the jury not based upon any evidence in the cause, and presented a memorandum in writing, setting forth what he claimed to be the statements so made. Among other things, it was stated that counsel had expressed the fear that the railroad employees who had testified against the company would lose their places, although there was no evidence on this point; that counsel for the railroad company rode in private and palace cars when they came to court, although there was no evidence on this point; that the mind could not grasp the extent of the resources and possessions of the Southern Railway Company, while Mr. Simmons was a poor man with nobody but his wife and child, and with no one to help him but his wife; that the treasury of the railway company was so exhaustless that it would hardly feel the loss of $50,000, the amount claimed in the declaration; and that, in estimating damages, they should take into consideration the fact that exceptions had been taken by the defendant, and that it had been stated that if the verdict was against it, it would appeal.

The court, with respect to this memorandum, says that its language is that of counsel for the defendant, and is not the exact language used by plaintiff's counsel in addressing the jury; and that it would be impossible, without an accurate report of the argument, for the court to certify what the language used was. From all of which we infer that the language imputed to counsel is substantially that which had been used by him in argument.

Great latitude is allowed in arguments before juries, and we

have no disposition to impose unreasonable conditions upon its exercise, or to hamper counsel in the slightest degree in the fullest and freest discussion of every fact and every view of the evidence which ought fairly and legitimately to influence the jury in arriving at a verdict. But the line of argument pursued in this case could have no other motive or object than to excite and inflame the minds of the jury against one of the litigants, and thereby to heighten the damages to be awarded. It was in a high degree improper, and had the attention of the court been called to it, counsel would doubtless have been restrained within just and proper limits, and the jury have been admonished to free their minds from considerations aroused by appeals to their passions and prejudices, and to confine themselves to ascertaining, in the light of the evidence and of legitimate argument, what would be a fair and just compensation to the plaintiff for the injuries he had sustained. Such a line of argument, if proper objection be made to it at the proper time and the trial court fails to take proper steps to correct its ill tendencies, will constitute a sufficient ground for reversing a judgment rendered upon a verdict thus obtained.

For the errors in the admission of testimony and with respect to instructions A and C, the judgment of the circuit court must be reversed.

**Note.**

**Dependents of Plaintiff.**—But in the title "Damages," vol. 8, Enc. of Law, p. 643, the author, after stating the rule as laid down by the court in the principal case, makes the following observation in a foot-note: "Cases Where Such Evidence Has Been Admitted.—Although the rule is that in actions for personal injuries brought by the person injured, evidence that the plaintiff had a family dependent upon him for support is not admissible, in not a few cases such proof seems to have crept into the record with no question made as to its admissibility. Thus in Georgia R., etc., Co. *v.* Keating, 99 Ga. 308, the court comments on the fact that the plaintiff had a wife and six or seven children whom he supported by his labor; and in Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, the court observes that the plaintiff when injured was, besides supporting hims lf, taking care of his widowed mother with nine children, and further, that the plaintiff had no resources for this end except his personal labor."

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WAYT *v.* GLASGOW.

Nov. 22, 1906.

[55 S. E. 536.]

**Municipal Corporations—Officers—Election—Statutes—Appeal.**—Acts 1893-94, pp. 201, 219, c. 205, amending the charter of Staunton, provided that the city council should elect at its first regular meet-